

The Special Administrative Law Judge awarded claimant permanent partial disability benefits for a 30 percent work disability and assessed one-third of the liability against the Workers Compensation Fund. Claimant requested review and contends the Special Administrative Law Judge erred by failing to award or address claimant's request for reimbursement of medical expenses incurred for treatment rendered to the left shoulder between April and September 1991. Also, claimant contends the Special Administrative Law Judge erred by failing to enter separate awards for the alleged July 9, 1988, accident and the accident that allegedly occurred between January 8, 1990, and June 27, 1990. Claimant also contends his work disability is higher than that found by the Special Administrative Law Judge. Respondent requested review of the issue concerning Workers Compensation Fund liability.

At oral argument, the parties agreed the greater weight of the evidence supported the conclusion that the medical expense related to the left shoulder treatment was related to the alleged 1990 accident and, therefore, was not an issue for review at this time. Also at oral argument, the parties narrowed the issues for review to the following:

- (1) Whether claimant sustained personal injury by accident arising out of and in the course of employment with the respondent on July 9, 1988.
- (2) The nature and extent of disability arising from the alleged July 9, 1988, accident.
- (3) Whether claimant sustained personal injury by accident arising out of and in the course of employment with the respondent during the period between January 8, 1990, and June 27, 1990.
- (4) The nature and extent of disability arising from that alleged accident.
- (5) The liability of the Workers Compensation Fund for that alleged accident.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

The Award entered by the Special Administrative Law Judge should be modified.

- (1) The Appeals Board finds that claimant sustained personal injury by accident arising out of and in the course of employment with the respondent on July 9, 1988. The evidence

is uncontroverted that claimant was working for the respondent at the time of the accident inspecting the roof of respondent's mine.

(2) The parties stipulated claimant has sustained a 12.5 percent whole body functional impairment as a result of the right shoulder injury and a 5 percent whole body functional impairment as a result of the left shoulder injury. However, the parties did not stipulate as to the manner the functional impairment was to be apportioned between the July 9, 1988, alleged accident and that alleged to have occurred between January 8, 1990, and June 27, 1990. Because the parties were unable to stipulate to that apportionment at oral argument, that issue must now be resolved by the Appeals Board.

The Appeals Board finds that claimant has established he permanently injured his right shoulder as a result of the July 9, 1988, accident. As a result of that accident, claimant received right shoulder surgery and remained off work until January 1990. Although it is true claimant experienced an exacerbation of both right and left shoulder symptoms during a work-hardening or functional capacities evaluation in August 1989, the evidence fails to establish that event caused permanent impairment to the left shoulder or increased permanent impairment to the right shoulder. Therefore, the Appeals Board finds that claimant has proven injury to his right shoulder as a result of the July 1988 accident for which he is entitled to receive permanent partial disability benefits.

Because his is an "unscheduled" injury, the computation of permanent partial disability benefits for the July 1988 accident is governed by K.S.A. 1988 Supp. 44-510e which provides in part as follows:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment. . . . There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

The Appeals Board finds that the presumption of no work disability is applicable for the July 1988 accident. Claimant, having been medically restricted from lifting above the shoulder level, returned to work for the respondent in January 1990 at a comparable wage. Therefore, claimant's permanent partial disability benefits should be limited to the functional impairment rating for the right shoulder.

The only evidence presented regarding claimant's functional impairment as it existed immediately before the return to work in January 1990 is from the treating

physician, orthopedic surgeon William H. Fulcher, M.D. Although Dr. Fulcher was not asked to apportion the right shoulder's permanent impairment between the alleged 1988 and 1990 accidents, he was asked whether he could apportion the impairment between the July 1988 accident and any exacerbation that occurred in August 1989 and testified that the majority of the functional impairment was related to the July 1988 accident. Although not ideal, that is the only evidence the Appeals Board has to attempt to apportion functional impairment between the two alleged accidents. As indicated below, the Appeals Board finds that claimant sustained additional injury to his right shoulder while working for the respondent in 1990 and, therefore, not all of the stipulated 12.5 percent whole body functional impairment is related to the July 1988 accident. However, based upon Dr. Fulcher's testimony, the Appeals Board finds that the majority of the 12.5 percent functional impairment arising from the right shoulder injury is the result of the July 1988 accident. As a "majority" means something more than 50 percent, claimant has established a whole body functional impairment of a minimum of 6.25 percent. The Appeals Board rounds that percentage to 6 percent and finds 6 percent the proper percentage upon which to award permanent partial disability benefits for the July 9, 1988, accident.

(3)(4) The Appeals Board finds that claimant sustained personal injury by accident arising out of and in the course of employment with respondent during the period between January 8, 1990, and June 27, 1990. The Appeals Board finds that during that period claimant reinjured his right shoulder and injured his left shoulder as a result of repetitive mini-traumas that claimant sustained as a result of his work. The Appeals Board finds that claimant's last day of work for the respondent, June 26, 1990, is the date of accident for purposes of this second accident. As a result of the second accident, claimant underwent a second right shoulder rotator cuff surgery in July 1990 and surgery to the left shoulder in April 1991.

As a result of the permanent bilateral shoulder injuries claimant sustained as a result of the 1990 accident, claimant now, according to Dr. Fulcher, is medically restricted from frequently lifting more than 25 pounds, single lifts greater than 50 pounds, and any lifting above the shoulders.

The appropriate statute governing the computation of permanent partial disability benefits for this second accident is K.S.A. 1989 Supp. 44-510e. Under that statute, the Appeals Board must again consider claimant's loss of ability to perform work in the open labor market and loss of ability to earn a comparable wage.

Respondent's vocational expert witness, Karen Terrill, testified that claimant had lost approximately 20-25 percent of his ability to perform work in the open labor market based upon Dr. Fulcher's restrictions. Claimant's vocational rehabilitation expert witness, Dick Santner, testified that claimant had lost approximately 53 percent of his ability to perform work in the open labor market based upon the same medical restrictions. Because there appears no valid reason to accept one expert's opinion over the other, the Appeals Board

averages those opinions and finds that claimant has lost approximately 38 percent of his ability to perform work in the open labor market as a result of the bilateral shoulder injuries.

The Appeals Board also finds that claimant has sustained an approximate 12 percent loss of ability to earn a comparable wage as a result of the 1990 accident. This conclusion is based upon comparing the stipulated average weekly wage of \$444.39 to \$390.54, which is the weekly average of claimant's 1992 earnings as taken from the W-2 form. The Appeals Board finds that claimant earned \$20,307.91, or an average of \$390.54 per week, while working for his brother's company during 1992. The Appeals Board also finds that \$390.54 per week fairly represents claimant's post-injury wage earning ability. There appears no good reason in the evidentiary record to disregard that amount and use some other sum. Although claimant so argues, he has not established that he is now limited to seasonal or part-time work.

Because there likewise appears no good reason to afford one loss greater weight than the other, the Appeals Board finds that the 38 percent loss of ability to perform work in the open labor market should be averaged with the 12 percent loss of ability to earn a comparable wage and concludes that claimant has a 25 percent work disability for which he is entitled to receive permanent partial disability benefits.

The Appeals Board also finds that claimant's benefits should be reduced under the provisions of K.S.A. 44-510a for any period that the permanent partial disability benefits payable for the July 9, 1988, accident overlap with the permanent partial disability benefits payable for the 1990 accident. The Appeals Board finds that 100 percent of the right shoulder injury arising from the July 1988 accident contributes to the overall disability sustained by claimant during the 1990 period of accident.

(5) The Appeals Board finds that the Workers Compensation Fund has no liability for the July 9, 1988, accident. Immediately before that accident, claimant did not have an impairment which constituted a handicap. However, the Appeals Board finds that claimant did have an impairment which constituted a handicap at the time he returned to work for the respondent in January 1990. At that time, claimant had been off work for right shoulder surgery and was returning to work under medical restrictions. The respondent had knowledge of claimant's initial injury, surgery, and restrictions and returned claimant to work despite that knowledge. The Appeals Board also finds that based upon the testimony of orthopedic surgeon Sergio Delgado, M.D., that claimant would not have sustained permanent bilateral shoulder injury between January 8, 1990, and June 27, 1990, "but for" the preexisting impairment. Therefore, under the provisions of K.S.A. 44-567, the Workers Compensation Fund is responsible for the entirety of the award for the 1990 accident.

(6) Based upon the above findings and conclusions, the Appeals Board finds the medical bills incurred by claimant for treatment of the left shoulder in 1991 are related to the 1990 accident and should be paid or reimbursed. Any issue regarding the

reasonableness or necessity of the treatment should be addressed under the utilization and peer review provisions of K.S.A. 44-510, as amended.

(7) The Appeals Board adopts the conclusions and findings of the Special Administrative Law Judge to the extent they are not inconsistent with the specific findings and conclusions made above.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award dated May 17, 1996, and Order Nunc Pro Tunc dated August 26, 1996, should be, and hereby are, modified.

Date of Accident July 9, 1988

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, William G. Gugenhan, and against the respondent, Georgia Pacific Corporation, a self-insured, **for an accidental injury which occurred July 9, 1988**, and based upon an average weekly wage of \$422.39 for 69.86 weeks of temporary total disability compensation at the rate of \$263 per week, or \$18,373.18, followed by 345.14 weeks at the rate of \$16.90 per week, or \$5,832.87, for a 6% permanent partial general disability, making a total award of \$24,206.05, which is due and owing less any amounts previously paid.

Date of Accident June 26, 1990

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, William G. Gugenhan, and against the respondent, Georgia Pacific Corporation, a self-insured, **for an accidental injury which occurred June 26, 1990**, and based upon an average weekly wage of \$444.39, for 93.71 weeks of temporary total disability compensation at the rate of \$271 per week or \$25,395.41; followed by 218.86 weeks of permanent partial disability benefits at the reduced rate of \$57.17, or \$12,512.23, which represents the period during which claimant's benefits are reduced by reason of the K.S.A. 44-510a credit; followed by 102.43 weeks of permanent partial disability benefits at the rate of \$74.07, or \$7,586.99, for a 25% work disability, making a total award of \$45,494.63.

As of November 22, 1996, there is due and owing claimant 93.71 weeks of temporary total disability compensation at the rate of \$271 per week, or \$25,395.41; followed by 218.86 weeks of permanent partial disability benefits at the reduced rate of \$57.17, or \$12,512.23; followed by 21.86 weeks of permanent partial disability compensation at the rate of \$74.07 per week, or \$1,619.17, for a total of \$39,526.81 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance

of \$5,967.82 is to be paid for 80.57 weeks at the rate of \$74.07 per week, until fully paid or further order of the Director.

The Workers Compensation Fund is ordered to pay or reimburse the entire award associated with the June 1990 accident.

The respondent and the Workers Compensation Fund are each assessed one-half of the administrative expenses associated with both accidents as set forth in the Award.

IT IS SO ORDERED.

Dated this ____ day of December 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John C. Peterson, Topeka, KS
James B. Biggs, Topeka, KS
Bob W. Storey, Topeka, KS
Office of Administrative Law Judge, Topeka, KS
Douglas F. Martin, Special Administrative Law Judge
Philip S. Harness, Director